IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925

No. 1228

CITY OF HAMMOND, a municipal corporation,

Petitioner,

vs.

SCHAPPI BUS LINE, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

WILLIAM J. WHINERY,
Attorney for Respondent.

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The respondent respectfully submits that the petition of the City of Hammond for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is without merit, and should be denied for each of the following reasons, to-wit:—

THE PETITION IN THIS CASE FOR A WRIT OF CERTIORARI IS WITHOUT MERIT.

1. This case is not one which, under Rule 35, Clause 5 of this Court, wherein a writ of certiorari should be granted.

2. No sufficient special or important reasons appear either in the petition of the City of Hammond, filed herein, or in the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, justifying the granting of a writ of certiorari in this case.

3. The opinion and decision of the United States Circuit Court of Appeals is clearly right. (See: Printed Record, pages 101 to 105, Opinion.)

4. The ordinance of the City of Hammond, held void, and which is set forth in full in the opinion of the United States Circuit Court of Appeals, is void on its face, and the Court rightly so held.

See: Printed Record, pages 102 to 105.
Yick Wo v. *Hopkins,* 118 U. S. 356 (30 Law Ed. 220, at page 227).

5. The opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit, in holding the ordinance of the City of Hammond void, is right, and is in strict accord with all decisions of the Supreme Court of the State of Indiana wherein similar ordinances were involved, and likewise held void by the highest Court of the State of Indiana.

See: *Bessonies* v. *City of Indianapolis,* 71 Ind. 189, at pages 197 to 198.
Bills v. *City of Goshen,* 117 Ind. 221, at pages 225 to 227.
City of Richmond v. *Dudley,* 129 Ind. 112.
City of Plymouth v. *Schultheis,* 135 Ind. 339.
State v. *Gerhardt,* 145 Ind. 439, at pages 479 to 493.
City of Elkhart v. *Murray,* 165 Ind. 304.
Bouge v. *Bennett,* 156 Ind. 478, at pages 480 to 486.

6. The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion, rightly held, that:

"We are of opinion that the ordinance cannot be sustained as a police regulation—and it is not claimed that it can be sustained upon any other theory."

(See: Opinion, Printed Record, pages 103 to 104.)

for the reason that said ordinance of the City of Hammond shows upon its face that the primary purpose of said ordinance is not regulation, with a view to safety, or to the conservation of the highways, but the prohibition of competition, and discrimination among persons engaged in the same business. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose, and in the same manner, and it leaves the determination of granting permission for such use to the uncontrolled, arbitrary discretion of the Board of Public Works of the City of Hammond. Such an ordinance, therefore, is void upon its face.

See: *Buck* v. *Kuykendahl,* U. S. Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions, No. 10, pages 301 to 303.)

Bush & Sons v. *Maloy,* U. S. Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pages 303 to 305.)

Cicero Lumber Co. v. *Cicero,* 176 Ill. 9 (68 Amer. St. Reps. 155, at pages 163 to 165).

See also: Indiana Cases cited under No. 5, *supra.*

7. The petitioner seeks, by its petition for a writ of certiorari in this court, to present questions entirely foreign to the decision and opinion of the United States Circuit Court of Appeals for the Seventh Circuit. This is not permissible in a petition for a writ of certiorari.

See: Printed Record, pages 101 to 105, Opinion.
Petitioner's Brief herein, pages 4 to 8.

8. The first point urged by the petitioner in its petition for a writ of certiorari is, that:

"The decree of the Circuit Court of Appeals for the Seventh Circuit is erroneous in the following particulars:

1. By its finding that respondent is a corporation of the State of Indiana;

whereas the pleadings aver, and the uncontradicted evidence is that, it is organized only in the State of Illinois."

See: Petitioner's brief, page 4, Point 1.

The United States Circuit Court of Appeals for the Seventh Circuit made no finding of facts in the instant case, and the word "Indiana" used in the opinion, to which objection is taken, is clearly a mere error in printing, and not an error on a question of law. Such a ground, urged for a writ of certiorari, is wholly without merit.

See: Printed Record, page 101, Opinion.
Petitioner's Brief, page 4, Point 1.

9. Said ordinance No. 1945 of the City of Hammond, held void by the United States Circuit Court of Appeals for the Seventh Circuit, attempts to deprive respondent, and others, of a common right on the public highways.

It is settled law, that, travelers, whether on foot or in carriages, have a right to stop a reasonable time by the roadside for their convenience. Hacks and omnibuses may stop to load and unload passengers. To receive and discharge passengers upon the public streets of a city is an essential and necessary part of the transportation, by automobile buses, of passengers from one place to another, and when this is being done in the usual and customary way under a permit regularly issued by the Public Service Commission of the State, as in the instant case, it is not within the power of a municipality to either prevent or prohibit it.

See: Volume 2, Elliott on Roads & Streets, 3rd Ed., Par. 1100.
Parker v. *City of Silverton*, Oregon Supreme Court, November 13, 1923, 220 Pac. 139 (31 A. L. R. 589, at page 593, Col. 2).

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10. When a municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, is brought before a court for determination, the court must be able to see that it is not only reasonable, but that it will tend to promote the public health, morals, safety, or welfare, and that the means adopted are adapted to that end, and that it is impartial in operation and not unduly oppressive upon individuals.

See: Ruling Case Law, pages 805 to 806, Par. 112.

Again, an ordinance passed by a municipal corporation, which attempts to restrict the right of dominion, which individuals might otherwise exercise, without question such restriction must be according to a general or uniform rule, and not so as to make the absolute enjoyment of the individual depend upon the arbitrary will of the governing authorities of the town or city, and if such ordinance fails to furnish a uniform rule of action, and leaves the right of enjoyment or property subject to the despotic will of the municipal officers, who may exercise it in accordance with some principle which it would not be within the constitutional power of the state to sanction, or even so as to give exclusive profits or privileges to particular persons, such an ordinance is void for discrimination and is unreasonable.

See: Vol. 2, Dillon on Municipal Corporations, 5th Ed., Par. 598, at pages 934 to 935.
19 Ruling Case Law, page 813, Par. 118.

Yick Wo v. *Hopkins*, 118 U. S. 356 (30 Law Ed. pages 220 to 228).
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Bessonies v. *City of Indianapolis*, 71 Ind. 189, at pages 197 to 198.

Respondent, therefore, most respectfully submits that the opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is right, and that the petitioner's request for a writ of certiorari herein should be denied.

Most respectfully submitted,

WILLIAM J. WHINERY,
Attorney for Respondent.

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